

## ORAL ARGUMENT NOT SCHEDULED

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS, <i>et al.</i> ,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 16-1078 (and
	)	consolidated cases)
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, <i>et al.</i> ,	)	
	)	
Respondents.	)	

## STATUS REPORT

Pursuant to the Court's May 1, 2017, Order (Doc. #1673454), EPA submits the following status report.

1. These cases concern EPA's final action establishing "reasonable progress" requirements for regional haze under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, titled: "Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze" (the "Final Rule"). The Final Rule was published at 81 Fed. Reg. 296 (Jan. 5, 2016).

2. As the Parties previously reported, *see* Doc. #1672209 at 4, on July 15, 2016, a motions panel of the United States Court of Appeals for the Fifth Circuit denied a motion to dismiss or transfer to this Court petitions for review of the Final Rule filed in the Fifth Circuit. The Fifth Circuit determined that both subject matter jurisdiction and venue properly lie in that court. *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016).

3. As the Parties also previously reported, *see* Doc. #1672209 at 5, on March 22, 2017, the same panel of the Fifth Circuit granted EPA's motion for a partial voluntary remand of the Final Rule and placed proceedings in that court in abeyance pending EPA's reconsideration of the Final Rule on remand.

4. On May 1, 2017, this Court issued an Order holding these cases in abeyance and directing the Parties to file status reports at 120-day intervals. Doc. #1673454. The Court further ordered the Parties to file motions to govern within 30 days of the disposition of the petitions for review in the Fifth Circuit.

5. As EPA has also explained to the Fifth Circuit, the initial significant action EPA expects to take on remand is to publish a notice of proposed rulemaking proposing to reconsider certain aspects of the Final Rule regarding the CAA's reasonable progress requirements. *See* 42 U.S.C. § 7607(d)(7)(B). But it has been EPA's intent to do so after completing proceedings on the related but separate CAA Best Available Retrofit Technology ("BART") requirements.

6. EPA published a BART final rule on October 17, 2017, 82 Fed. Reg. 48,324 (Oct. 17, 2017), which was challenged in *Nat'l Parks Conservation Ass'n, et al. v. EPA*, Case No. 17-60828 (5th Cir.). After those same petitioners also filed an administrative petition with EPA requesting reconsideration of the BART final rule, the Fifth Circuit held the proceedings in that case in abeyance pending the resolution of the petition for reconsideration and the completion of any reconsideration process on the BART final rule.

7. Following multiple proposals and public comment periods, EPA has now completed reconsideration proceedings on the BART final rule. Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan ("2020 BART Rule"), *available at* [https://www.epa.gov/sites/production/files/2020-06/documents/frn\\_tx\\_rh\\_trading\\_rule\\_affirmation-\\_final\\_rule\\_6-19-20.pdf](https://www.epa.gov/sites/production/files/2020-06/documents/frn_tx_rh_trading_rule_affirmation-_final_rule_6-19-20.pdf).

8. Now that the BART requirements in Texas have been determined, EPA intends to turn its attention to developing a notice of proposed rulemaking to address the reasonable progress requirements on remand in this case. EPA is currently coordinating with Texas, which EPA understands is now preparing a state implementation plan submittal, due by July 2021, to address reasonable progress requirements for the second planning period. To the extent that outstanding reasonable progress requirements from the first planning period remain, EPA is in discussions with Texas regarding how EPA and the State may address those in concert with the

requirements for the second planning period. EPA is therefore considering options for addressing the remand through the process of reviewing the potential upcoming state implementation plan submittal from Texas, which may obviate the need for separate rulemaking action to reconsider EPA's remanded plan, as originally intended.

9. Accordingly, agency proceedings on remand of the Final Rule are ongoing and this case should remain in abeyance.

10. Counsel for EPA has coordinated this status report with counsel for other parties. The Luminant Petitioners<sup>1</sup> and Petitioners Coletto Creek Power did not respond to EPA's inquiry. EPA is informed that the remaining parties consent to this report.<sup>2</sup>

11. The next 120-day status report is due to be filed on or before November 16, 2020.

DATED: July 24, 2020

Respectfully submitted,

OF COUNSEL

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<sup>1</sup> The Luminant Petitioners include Luminant Generation Company LLC, Big Brown Power Company LLC, Luminant Mining Company LLC, Big Brown Lignite Company LLC, Luminant Big Brown Mining Company LLC.

<sup>2</sup> The National Parks Conservation Association and Sierra Club requested the following statement to be included with their consent: "Although Intervenor-Respondents National Parks Conservation Association and Sierra Club consent to this status report, they disagree with the suggestions in paragraph 8 that (i) outstanding reasonable progress requirements from the first planning period might not remain, and (ii) the discussions between EPA and Texas could obviate the need for further rulemaking action to reconsider the remanded Final Rule."

**CERTIFICATE OF SERVICE**

I hereby certify that the above Status Report was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record, who are required to have registered with the Court's CM/ECF system.

Date: July 24, 2020

/s/ Samara M. Spence  
SAMARA M. SPENCE